



May 11, 2018

The Honorable Robert E. Lighthizer
United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508.

RE: Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation (Docket No. USTR-2018-0005)

BSA | The Software Alliance (BSA)¹ is grateful for the opportunity to provide comments to the United States Trade Representative (USTR) on the USTR's determination that the acts, policies, and practices of the Government of China has engaged in unreasonable or discriminatory actions relating to technology transfer, intellectual property, and innovation, and on the proposed determination on U.S. action in response to Chinese actions.

BSA is the leading trade association representing the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, developing cutting-edge solutions in use across the range of information technology (IT) platforms, and are global leaders in advancing cybersecurity. Many of its members have significant and long-standing presences in China, and have seen first-hand the challenges and evolution of China's policies in the technology sector.

I. USTR Determination on Acts, Policies, and Practices Under Investigation

China, as the largest U.S. trading partner and the world's second largest economy, is an important market for U.S. companies to reach new consumers and pursue innovative business relationships. A fair, transparent, consistently enforced, and internationally-harmonized policy environment in China is critical to ensuring that US companies operating in China can compete on an even playing field, and in a manner that does not put their valuable intellectual property at risk. China's compliance with its obligations as a member of the World Trade Organization (WTO) and with key bilateral and multilateral commitments *would be* an especially important indicator of its commitment to a rules-based trade framework.

¹ BSA's members include: Adobe, ANSYS, Apple, Autodesk, Bentley Systems, Box, CA Technologies, CNC/Mastercam, DataStax, Docusign, IBM, Informatica, Microsoft, Okta, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trimble Solutions Corporation, The MathWorks, Trend Micro, and Workday.

In its comments to the USTR at the outset of the Administration's Section 301 investigation into China's trading practices, BSA highlighted several specific areas of concern: (a) foreign direct investment restrictions, including policies relating to Value-Added Telecommunications Services; (b) restrictions on cross-border data transfers; (c) requirements for source code and enterprise standard disclosure; and (d) reliance on indigenous technical standards. These areas of concern closely mirror the USTR's determination on Chinese acts, policies, and practices investigated in its Section 301 inquiry, and represent substantial challenges to BSA members who seek to compete in Chinese markets.

In recent years, China has made progress in revising its laws and economic policies to address concerns about market access and state intervention in the economy, and has made some strides toward a rules-based trading system consistent with WTO and other international obligations. However, significant concerns remain. BSA is grateful for USTR's examination of these concerns, and for its commitment to seeking more equitable market access and legal protections for US businesses seeking to operate in China.

II. Proposed Actions to Resolve Concerns

BSA has repeatedly called on both the US and Chinese governments to engage in dialogue toward achieving mutually beneficial solutions to these challenges. In BSA's view, remedies that could have significant ramifications for the trading system should be carefully considered to avoid harm to job creation in the US and innovation globally.

Establishing a more equitable foundation for the US-China trade relationship is important; equally important is that these concerns be addressed in a way that can achieve mutual progress toward strengthening the overall health of this relationship. BSA encourages constructive dialogue between the US Government and the Government of China aimed at win-win solutions.

Specifically, BSA would prioritize the following issues to be addressed through such a dialogue:

- (1) *VATS Licensing Requirements.* Notwithstanding recent Chinese measures to liberalize restrictions on value-added services, telecommunications and information technology products remain overly and unfairly restricted. BSA urges the USTR to seek a loosening of restrictions to ensure equitable market access and enable foreign businesses to compete in these arenas on a level playing field.
- (2) *Cross-Border Data Transfer Restrictions.* Cross-border data transfers are increasingly essential for global businesses that depend on cloud computing and other data-centric technologies. BSA urges the USTR to seek a loosening of Chinese restrictions on cross-border data transfers, including by seeking to align China's definitions of critical infrastructure information and personal information, which underpin many of its most problematic regulations, with international standards and best practices.
- (3) *Clarification of Security Reviews.* China continues to develop policies, processes, and standards for conducting security reviews mandated by the *Cybersecurity Law* and other laws and policies. As these efforts proceed, BSA urges the USTR to seek a clarification by the Government of China that source code and enterprise standards disclosure will not be required under security reviews, and that security reviews can be conducted by internationally accredited international third-party certification authorities.

In addressing these concerns, BSA urges USTR to engage in dialogue with the Government of China that can lead to meaningful solutions to the problems identified and a sounder mutual foundation for addressing concerns going forward.

BSA also believes that such dialogue can be most effective when it is undertaken in concert with other affected nations using established resolution mechanisms. To that end, BSA appreciates the President's Memorandum directing that the USTR "pursue dispute settlement in the World Trade Organization (WTO) to address China's discriminatory licensing practices" in cooperation with other WTO members. Such an approach to dispute settlement offers the opportunity for the US to assemble a broad coalition of nations similarly impacted by China's discriminatory practices, to fully articulate and provide evidence for these concerns, and to seek a resolution through a mechanism that reinforces both US leadership in support of a strong international system and Chinese participation in that system.

Again, BSA is grateful for USTR's attention to resolving the serious challenges faced by the software industry in the areas discussed above. Addressing these concerns is of the utmost importance to the industry; the US-China trade relationship is critical to the present and future of US businesses, and these concerns in a constructive way can strengthen this relationship in ways that help both economies continue to grow and prosper. BSA looks forward to continuing to engage with the USTR, the US Government, and the Government of China to foster constructive dialogue find meaningful solutions to these important challenges.

Sincerely,



Tommy Ross
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